No. 89-1416

In The

Supreme Court of the United States

October Term, 1990

AIR COURIER CONFERENCE OF AMERICA,
Petitioner,

v.

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

Of Counsel:

JAMES I. CAMPBELL, JR.
2011 Eye Street, N.W.
Washington, D.C. 20006
(202) 223-7080

L. PETER FARKAS
Counsel of Record
BRETT S. SYLVESTER
SUCHRUE, MION, ZINN,
MACPEAK & SEAS
2100 Pennsylvania Ave., N.W.
Washington, D.C. 20037-3202
(202) 293-7060

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Are postal employees within the "zone of interest" of the Private Express Statutes that establish and allow the United States Postal Service to suspend restrictions on the private carriage of letters when "the public interest requires?"

2. Did the Postal Service act unreasonably, arbitrarily, or capriciously in promulgating its international remail regulation under the "public interest" standard for suspending the Private Express Statutes where it found no adverse effects on revenues and found general benefits to the public, competition, and users of remail services?

LIST OF PARTIES

In addition to the parties named in the caption, the parties below included the United States Postal Service (Postal Service) and the National Association of Letter Carriers, AFL-CIO (NALC). The Air Courier Conference of America (ACCA) is a trade association with approximately 150 members. Respondent, the American Postal Workers Union (APWU) and NALC will be referred to jointly as the "Unions."

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BRIEF FOR PETITIONER

OPINIONS BELOW

1. Restrictions on Private Carriage of Letters; Suspension of the Private Express Statutes; International Remailing, Final Rule, United States Postal Service, 51 Fed. Reg. 29,636 (August 20, 1986), Joint Appendix (Jt. App.) 97 to 106 (International Remail Rule).

2. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, No. 87-3199, slip op. (D.D.C. February 26, 1988), Order granting Air Courier Conference of America's motion to intervene, Petition for Writ of Certiorari Appendix Pet. App. 27a.

3. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 701 F. Supp. 880 (D.D.C. 1988), Pet. App. 27a to 38a.

4. *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 891 F.2d 304 (D.C. Cir. December 8, 1989), Pet. App. 1a to 18a.

JURISDICTION

The order of the court of appeals was entered on December 8, 1989. The petition for a writ of certiorari was filed on March 8, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Air Courier Conference of America (ACCA) was a party below. See district court order granting ACCA's motion to intervene (February 26, 1988), Pet. App. 27a; ACCA's Entry of Appearance in the court of appeals (February 6, 1990). Certiorari was granted on June 4, 1990.

ACCA members engage in international remail pursuant to the Postal Service regulation at issue, 39 C.F.R. § 320.8. ACCA has standing pursuant to *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and *International Union, UAW v. Brock*, 477 U.S. 274, 288-290 (1986).

RELEVANT STATUTES AND REGULATIONS

The statutory restrictions on the private carriage of letters, referred to below as the Private Express Statutes (PES), include 18 U.S.C. §§ 1693-1699, 1729 (1982) and 39 U.S.C. §§ 601-606 (1982), and provide in pertinent part as follows:

18 U.S.C. § 1696. Private express for letters and packets

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over

any post route which is or may be established by law, or from any city, town or place to any other city, town or place, between which mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both.

This section shall not prohibit any person from receiving and delivering to the nearest post office, postal car, or other authorized depository for mail matter any mail matter properly stamped.

(b) Whoever transmits by private express or other unlawful means, or delivers to any agent thereof, or deposits at any appointed place, for the purpose of being so transmitted any letter or packet, shall be fined not more than $50.

(c) This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only. Whenever more than twenty-five such letters or packets are conveyed or transmitted by such special messenger, the requirements of section 601 of title 39, shall be observed as to each piece.

The regulation at issue was promulgated by the United States Postal Service pursuant to 39 U.S.C. § 601, which provides as follows:

39 U.S.C. § 601. Letters carried out of the mail

(a) A letter may be carried out of the mails when—

(1) it is enclosed in an envelope;

(2) the amount of postage which would have been charged on the letter if it had been sent by

mail is paid by stamps, or postage meter stamps, on the envelope;

(3) the envelope is properly addressed;

(4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;

(5) any stamps on the envelope are canceled in ink by the sender; and

(6) the date of the letter, of its transmission or receipt by the carrier is endorsed on the envelope in ink.

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

The Postal Service's International Remail Rule, 39 C.F.R. § 320.8 (1990), the regulation at issue, provides in pertinent part:

§ 320.8 Suspension for international remailing.

(a) The operation of 39 U.S.C. § 601(a)(1) through (6) and § 310.2(b)(1) through (6) of this chapter is suspended on all post routes to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.

(b) This suspension shall not permit the shipment or carriage of a letter or letters out of the mails to any foreign country for subsequent delivery to an address within the United States.

(c) Violation by a shipper or carrier of the terms of this suspension is grounds for administrative revocation of the suspension as to such shipper or carrier for a period of one year in a proceeding

instituted by the General Counsel in accordance with Part 959 of this chapter. The failure of a shipper or carrier to cooperate with an inspection or audit authorized and conducted by the Postal Inspection Service for the purpose of determining compliance with the terms of this suspension shall be deemed to create a presumption of a violation for the purpose of this paragraph (c) and shall shift to the shipper or carrier the burden of establishing the fact of compliance. Revocation of this suspension as to a shipper or carrier shall in no way limit other actions as to such shipper or carrier to enforce the Private Express Statutes by administrative proceedings for collection of postage (*see* § 310.5) or by civil or criminal proceedings.

STATEMENT OF THE CASE

1. Statutory Background

Restrictions on the private carriage of letters in the United States originate in the postal monopoly conferred by the Crown in Elizabethan England, more as a security than an economic measure. Although the Articles of Confederation granted Congress an "exclusive right" to establish post offices, the Constitution merely gave Congress the power to establish "Post Offices and Post Roads." Restrictions on private expresses are therefore statutory, not constitutional.[1]

Congress enacted restrictions on the private carriage of letters in piecemeal fashion with legislation in 1789, 1792, 1825, 1827, 1845, 1852, and 1872. The current Private Express

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[1] Priest, *The History of the Postal Monopoly in the United States*, 13 J. Law and Economics 33, 35, and 45 (1974); J. Haldi, *Postal Monopoly: An Assessment of the Private Express Statutes* 3 (1974).

Statutes (PES),[2] virtually unchanged since 1872,[3] are based on the 1909 recodification of the criminal provisions and recodification of the civil provisions without debate or substantive change in the 1970 Postal Reorganization Act (PRA), 39 U.S.C. § 101 *et seq.* (1982).[4]

The PRA was the result of the public and business community's demands for more efficient and dependable postal services.[5] The Kappel Commission on Postal Reform appointed by President Johnson issued a report in June 1968 recommending sweeping changes in the postal system to make it more efficient and businesslike and less political.[6] Most of the Commission's recommendations were soon incorporated into proposed legislation that was vigorously opposed by the

[2] Although the Postal Service's convention of referring to the statutory restrictions on the private carriage of letters as the "Private Express Statutes" or "postal monopoly laws" is continued here, that terminology injects a certain pro-monopoly bias into any discussion. The piecemeal enactment of the various restrictions belies the aura of a unified body of law that either designation implies. Moreover, equating the PES with a "postal monopoly" obscures the single most elastic source of penal sanctions against the private carriage of letters, namely the Postal Service's historical expansion of the definition of "letters" by regulation. *See Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824, 831 (D.C. Cir. 1979) (Wilkey, J., dissenting).

[3] Priest, *supra* n.1, at 67 n.168.

[4] H.R. Rep. No. 1104, 91st Cong., 2d Sess. 44 (1970) ("this chapter [14 of PRA] continues without substantive change the portion of the private express statutes found in existing chapter 9 of title 39"). For more complete statutory history, *see* footnote 43, *infra*.

[5] *Report of the President's Commission on Postal Organization: Entitled "Toward Postal Excellence"* (June 1968), House Committee on Post Office and Civil Service, 94th Cong., 2d Sess., Comm. Print No. 94-25 (November 24, 1976) (Kappel Report) at 12-13; J. Tierney, *Postal Reorganization: Managing the Public's Business* 2 (1981).

[6] Kappel Report, *supra* n.5, at 2-3.

postal employees' unions.[7] While postal reform legislation was pending in 1969, legislation was also introduced to raise postal employee wages. Postal employee unions favored a wage increase but opposed combining the postal reform and pay increase bills.[8] The bills were nonetheless combined and eventually endorsed by the unions after the addition of provisions for retroactive pay increases and faster track to higher pay levels, to the original prospective wage increase provision.[9]

2. Administrative Proceedings

The 1970's saw increased demand for faster, more reliable business communications and the emergence of private air couriers offering overnight delivery to meet that demand. The Postal Service responded by threatening couriers with action to enforce the PES; harassing courier customers with demands for postage on their courier shipments; and initiating Express Mail Service to compete with private air couriers.[10] The couriers in

[7] *Hearings before the House Committee on Post Office and Civil Service*, 91st Cong., 1st Sess. 742 (1969) (testimony of James H. Rademacher, President, National Association of Letter Carriers) ("postal corporation ... would be a nightmare for almost every segment of our population"). *See also* Dolenga, *An Analytical Case Study of the Policy Formation Process (Postal Reform and Reorganization)* 520, 530-531 (1973).

[8] *Hearings of the Senate Committee on Post Office and Civil Service*, 91st Cong., 1st Sess. (statement of James A. Rademacher, President National Association of Letter Carriers, AFL-CIO) ("no logical reason for tying badly needed pay raise for our people with the postal reform legislation").

[9] *Explanation of the Postal Reorganization Act and Selected Background Material*, prepared by the Senate Committee on Post Office and Civil Service, 94th Cong., 1st Sess. 3 (Revised July 1975); *see also* Dolenga, *supra* n.7, at 549.

[10] *Hearings on the Private Express Statutes before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 32-37 (statement of Frederick W. Smith); 206-207 (statement of James I. Campbell) (1979).

turn asked Congress for legislation to exempt urgent letters from the PES.[11] In 1979, the Postal Service preempted proposed legislation by promulgating a regulation suspending the PES for "extremely urgent letters." 39 C.F.R. § 320.6, 44 Fed. Reg. 61, 181 (October 24, 1979).

In the early 1980's the demand for faster, more reliable and cheaper business communication expanded internationally.[12] Air couriers began to offer international door-to-door air courier services. Some couriers and airlines began to offer international remail services. Rather than delivering a shipment directly to the addressee as with door to door service, remailers delivered multiple business letters or printed documents in bulk to a foreign post office for delivery in that or other countries. The Postal Service objected to remail; sought but was denied Justice Department enforcement action under the PES;[13] and in 1985, under the guise of "clarifying" the 1979 urgent letter rule, proposed a regulation that would have declared remail unlawful under the PES. 50 Fed. Reg. 41,462 (October 10, 1985), Jt. App. 2.

The Postal Service's proposed anti-remail regulation drew intense and virtually unanimous opposition. Opponents included the Reagan Administration, Congress, the remail industry and its customers. The Department of Justice opposed the regulation: (1) voicing doubts that the PES even applied to international mail; and (2) concluding that international remail does not undermine the purposes of the PES:

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[11] *See Report of the Senate Comm. on Governmental Affairs on the Postal Service Amendments Act of 1978*, S. Rep. No. 1191, 95th Cong., 2d Sess. 17-21 (1978) (reporting favorably an amendment to exempt urgent letters from the postal monopoly); *Hearings on the Private Express Statutes before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. (1979) (House committee members expressing frustration with resistance to an exemption for urgent letters from the Postmaster General).

[12] *See* comments of International Remail Committee, Jt. App. 9.

[13] Statement of Walter Duka, Assistant Postmaster General, Int'l Postal Affairs, to Postal Service Board of Governors, Tr. 49-50 (September 6, 1985).

> A number of factors raise doubts as to whether Congress intended to extend the Postal Service monopoly to international mail. In the first instance, the plain language of the Private Express Statutes grants the Postal Service a monopoly over domestic carriage. With respect to an international monopoly the statutes are silent. Given the national economic policy of fostering competition, the courts will require a clear expression of congressional intent to create a monopoly, or otherwise restrict competition. Unless it were necessary to give the Postal Service a monopoly over international mail in order to effectuate some domestic policy goal, like "universal service," the courts would not impute to Congress an intent to create a monopoly over international mail. As we indicate in Section B.2, *infra*, there is no evidence that granting the Postal Service a monopoly over international mail is necessary in order to provide domestic universal service or any other domestic goal of Congress.

Jt. App. 28-29.

The Office of Management and Budget and the Department of Commerce raised other economic and competition policy concerns, invoked the public interest, and argued against the proposed rule on grounds of potential harm to the international competitiveness of American firms. (Jt. App. 43-47).

Several members of Congress argued against the proposed anti-remail rule. Three members of the Committee on Post Office and Civil Service, House Subcommittee on Postal Operations and Services, including its chairman and ranking minority member, wrote that "the Subcommittee finds no justification or basis for the action proposed by the USPS." Jt. App. 41, 53.

Members of the remail industry and its customers opposed the proposed anti-remail rule on legal, public policy, international competitiveness and business grounds. The International Remail Committee submitted a detailed analysis of revenue impact, concluding it would have little if any impact on Postal Service revenues. At worst, the then estimated $ 60 million annual remail business represented a net loss of no more than $ 3 million or 0.025 percent of net Postal Service revenues. Jt. App. 8. The Committee also analyzed international remail in light of the Board of Governors 1973 Report on the PES and found no inconsistency between remail and the purposes of the PES articulated by the Board. *Id.* at 12-16. The Committee also submitted the favorable results of a poll of large mailers. *Id.* at 9-11.

Responding to this opposition, the Postal Service in March 1986 withdrew the proposed anti-remail rule and announced its intention to propose an alternative, pro-remail rule. 51 Fed. Reg. 9652 (March 21, 1986), Jt. App. 50. The withdrawal announcement included the following statement by John R. McKean, Chairman of the Postal Service Board of Governors:

> Congress entrusted us with this monopoly not for our own benefit but in order to let us better serve the American people. The critical question raised by this rulemaking is whether enforcement of the monopoly in this context would advance or retard consumer welfare and the interests of this nation.
>
> It is the sense of the Board that private sector competition with the Postal Service in the provision of international remail services can - and already does - produce significant benefits to the public. Ultimately even the Postal Service itself can benefit from this kind of competition.
>
> • • •
>
> The Board of Governors does not believe that any attempt to suppress this kind of competition

> would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people.

51 Fed. Reg. at 9853, Jt. App. 55-56.

On June 17, 1986 the Postal Service proposed a new rule suspending the PES "to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States." 51 Fed. Reg. 21,929 (June 17, 1986), Jt. App. 75. The Department of Justice "strongly endorsed" the proposed regulation as "based on an ample factual record that demonstrates that *competition in international remail is in the public interest.*" Jt. App. 83 (emphasis added).

The only opposition to the new remail rule came from the postal employees' unions. However, apart from allegations that "APWU and NALC members are directly affected in their employment opportunities, and as members of the public and users of the mails," Jt. App. 85, the unions confined their comments to legal arguments regarding the PES, Jt. App. 86-89, the public interest requirement in the suspension provision, Jt. App. 91-92, and the quality of the administrative record. Jt. App. 92. Rather than offer any evidence of harm to the public interest, the Unions sought delay for further study by the Postal Service. Jt. App. 95. The Unions offered no cost analysis, projections of effects on net postal revenues or any rebuttal to the International Remail Committee's analyses and polling results.

The remail rule issued on August 20, 1986 substantially as proposed. 51 Fed. Reg. 29,636, Jt. App. 97. The Postal Service's statement issuing the final rule noted that eight of the nine additional comments submitted in response to its June 17 notice expressed support for the proposal, Jt. App. 98, and that:

> After careful consideration of all the comments including those submitted in previous related proceedings, the Postal Service, also bringing to the process its knowledge of and experience with the international mails, has concluded that the proposed suspension should be adopted without substantial change or modification.

Jt. App. 98.

3. Decisions Below

On November 25, 1987, the Unions filed suit in district court for declaratory and injunctive relief against enforcement of the international remail rule on grounds that the Postal Service had acted arbitrarily and capriciously in adopting it. The district courts have original jurisdiction over suits against the Postal Service under 39 U.S.C. § 409 (1982).

On December 20, 1988, the district court granted the Postal Service's motion for summary judgment in which intervenor ACCA had joined. Pet. App. 28a. Judge Richey held that, while the Unions had Article III standing, they nonetheless lacked standing to sue because they were not within the "zone of interest" of the PES. On the merits, the district court held that even if the Unions had standing, (1) the Postal Service had not exceeded its suspension authority under the Unions' "heightened interpretation" of the 39 U.S.C. § 601(b) "public interest requires" standard and (2) the remail rule was not arbitrary, capricious nor an abuse of discretion because the Postal Service had "identified the factors supporting its decision, drawn rational inferences where detailed facts did not exist, and drawn a rational connection between the facts and the decision made." Pet. App. 37a. The Unions appealed.

On December 8, 1989, the court of appeals vacated the summary judgment for the Postal Service. The District of Columbia Circuit held that the zone of interest of the PES,

though dating back to 1792, had to be viewed in the context of the entire statutory framework of the 1970 Postal Reorganization Act (PRA). 39 U.S.C. § 101 *et seq.*, Pub. L. 91-375 (August 12, 1970), of which, the court said, "the PES are a part." The court then found that "a key impetus for the PRA appears to have been a nationwide work stoppage by postal employees which occurred in March 1970" and "[t]herefore a principal purpose of the PRA was to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." Pet. App. 8a. This "interplay" between the PES and PRA persuaded the court "that there is an 'arguable' or 'plausible' relationship" between the PES's goal of universal postal service and the employment interests of the Unions. Pet. App. 8a-9a.

Alternatively, the court held that even without the interplay between the PES and PRA, the Unions would be in the zone of interest of the PES because "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." *Id.* Therefore, the court concluded, the Unions have standing because their "interests are largely congruent with the purposes of the PES." *Id.* 10a.

The court of appeals then concluded that the Postal Service applied the § 601(b) public interest test too narrowly by considering only the benefits of the international remail rule and only to the segment of the Postal Service's consumer base that engaged in international commerce. The court held that the Postal Service's "interpretation of the 'public interest' is not reasonable because it did not give sufficient attention to how revenue losses might affect cost and service of other postal patrons." *Id.* 14a.

The court of appeals therefore remanded the case to the district court with instructions to vacate the grant of summary judgment and to allow the Postal Service to reopen its Interna-

tional Remail Rule proceeding or to take any other action consistent with its ruling. Pet. App. 16a.

ACCA petitioned for writ of certiorari on March 8, 1990. The Court granted ACCA's petition on June 4, 1990.

SUMMARY OF ARGUMENT

I. The court of appeals erred in holding that the Unions had standing to enforce the PES under the zone of interest test.

First, the court of appeals misconstrued the zone of interest test. The court eviscerated the zone of interest test by construing it to confer standing to sue where the plaintiff's interests are merely "congruent" with the purposes of the statute the plaintiff seeks to enforce. By ignoring the requirement that a plaintiff establish that it is among the class Congress intended to enforce the statute or, at the very least, that Congress intended it to benefit by that statute, the court below, in effect, reduced the "prudential" zone of interest test to a redundant injury in fact analysis. In addition, the court extended the zone of interest of a statutory scheme from those directly affected by it and their competitors to a secondary level of those merely employed by the party subject to the regulatory scheme.

Second, the court of appeals misconstrued the legislative history of the PES. The court, by focussing on the "revenue protective" features of the 1792 Act, ignored the fact that (1) the narrow prohibitions of the 1792 Act did not establish a "postal monopoly," (2) the 1792 Act, enacted at a time when the General Post Office was part of the Treasury, was a general revenue provision pursuant to congressional taxing authority, and (3) the Act could not have benefited postal employees, because the Post Office had yet to establish the services that require substantial employment or to obtain authority to hire letter carriers.

Third, the court of appeals failed to examine the legislative history of the 1845 Act, the only occasion on which Congress debated the PES. That legislative history demonstrates that restrictions on private carriage were enacted for two reasons. One goal was to prevent individuals in outlying regions from taking commercial and political advantage of news travelling faster by private means than the Post Office could deliver it by mail. Another goal was to unify the country by allowing the Post Office to generate sufficient revenues, by eliminating competition, to expand mail service to the frontier and subsidize that service. Revenue protection, cross-subsidization of rates, and the prevention of "cream-skimming" by private express were merely the means by which Congress intended to support the costs of its nation-building goal.

Fourth, a number of provisions that remain in the PES today demonstrate that, to the extent that the PES's revenue protective measures are even separable from their intended purposes, they do not subsume the interests of postal employees. Since the earliest days, Congress permitted contracting out of transportation services, competition from special messengers, private carriage of letters without charge, and private carriage if regular postage is paid.

Fifth, the court of appeals erred by relying on the 1970 Postal Reorganization Act to define the zone of interest of the Private Express Statutes. In so doing, (1) the court unnecessarily reached beyond the PES and its legislative history to redefine the PES's unambiguous zone of interest. (2) The court unnecessarily substituted an undefined "interplay" test for this Court's requirement of a "single unified purpose" between two statutes before one can help define the other's zone of interest. A mere interplay between two laws is insufficient to establish that Congress enacted them for the same reason, particularly where, as here, the PES and PRA operate at cross-purposes. (3) The court erred in finding any relevant interplay between the PRA

and PES given the Unions' vocal opposition to the PRA's enactment.

II. The court of appeals erred, whether the jurisdictional provisions of the Postal Reorganization Act or the Administrative Procedures Act (APA) apply.

The Unions challenged the Remail Rule under the substantive provisions of the PES and asserted jurisdiction under the PRA. The court of appeals considered the Unions' standing under the APA. Because the Unions lack standing under the "generous" APA provisions, they cannot establish standing under the presumably less generous requirements of the PRA.

III. The court of appeals erred in holding that the Postal Service was unreasonable, arbitrary and capricious in promulgating the international remail rule.

The court burdened the PES's public-interest based suspension provision with the requirement that the Postal Service consider the effects of the remail rule on the cost and service of all postal patrons, in addition to the general benefits to the public, to competition, to international competitiveness and to users of remail that the Postal Service found. Inasmuch as the court addressed no legal issue with respect to the public interest standard of the suspension provision, it was unnecessary for the court to address the PES's purposes to determine the reasonableness of the Postal Service's interpretation of the public interest.

ARGUMENT

I.

THE UNIONS LACK STANDING BECAUSE POSTAL WORKERS ARE NOT WITHIN THE ZONE OF INTEREST OF THE PRIVATE EXPRESS STATUTES

The Unions' complaint alleges a substantive violation of the PES by the Postal Service in promulgating the international remail rule, Complaint 1, Jt. App. 107, and invokes district court jurisdiction under § 409 of the PRA, 39 U.S.C. § 409 (1970). *Id.* at 108. The court of appeals applied the standards of § 702 of the APA, 5 U.S.C. § 702, to assess the Unions' standing to sue.[14] To establish standing to sue under § 702, a plaintiff must first establish that it has "suffered a legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statue." *Lujan v. National Wildlife Federation*, ___ U.S. ___, 58 U.S.L.W. 5077, 5080 (June 27, 1990) (internal punctuation omitted). This has been called the "injury in fact" test.[15] Second, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation

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[14] The district court assumed § 702 to apply and the court of appeals applied its standards on grounds of the Postal Service's stated intent to abide by the APA voluntarily. That the Unions actually invoked the district court's jurisdiction under 39 U.S.C. § 409 is immaterial. *See* discussion at pp. 36 to 37 *infra*.

[15] The district court's finding that the Unions satisfied the injury in fact test was not appealed. However, the Unions' inability to establish any direct effect of the remail rule on employment levels after the rule had been in effect for nearly two years, raises some questions about the injury finding after this Court's decision in *Lujan*. *See also Atlantic Richfield Co. v. USA Petroleum Co.*, ___ U.S. ___, 110 S.Ct. 1884, 1889 (1990) (private plaintiff has no standing to recover damages under antitrust laws merely by showing injury causally limited to an illegal presence in the market).

forms the legal basis of his complaint." *Id.*, *citing Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396-397 (1987).

A. The Court of Appeals' Interpretation Effectively Eliminates the Zone of Interest Test

1. Congruence of Interests and Effect is Insufficient to Establish Congressionally Intended Benefits

The court of appeals erred in holding that a mere "congruence" of the PES's revenue protective goals with postal employees' interests bring postal employees within the zone of interest of the statute. In so doing, the court in effect abandoned the "prudential" element of the zone of interest test and reformulated it into a redundant injury in fact test.

The court of appeals' critical step in virtually eliminating the zone of interest test is found in its statement that:

> [C]ongressional intent to benefit the Unions is not required. [Citing *Clarke*, *supra*, at 400 n.15.] That postal workers benefit from the PES's function in ensuring a sufficient revenue base, however, is scarcely deniable. Thus, the Unions' interests arguably are within the zone of interests contemplated by the PES. . . The relationship of the plaintiff to the statute need only be arguable, not wholly coincident. Instead of requiring an *a priori* showing that no conflicts could possibly ensue from a grant of standing, the zone of interests inquiry only "seeks to exclude those plaintiffs whose suits are more likely to frustrate than further statutory objectives." *Clarke*, 479 U.S. at 397 n.12

Pet. App. 9a.

First, the court of appeals' reliance on footnotes 12 and 15 in Part II of *Clarke*, which the concurring Justices refused to join as "as a wholly unnecessary exegesis on the 'zone of interest test,'" *id.* at 410, is misplaced in light of *Lujan v. National Wildlife Federation*, ___ U.S. ___, 58 U.S.L.W. 5077, 5080 (June 27, 1990). In *Lujan* the Court taught:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

This example illustrates that establishment of a congressional intent to benefit postal employees by the PES is a requirement to satisfy the zone of interest test.

Second, the benefits of the PES's revenue protective measures to the Unions is less obvious than the court of appeals found. Indeed, the causal relationship between private competition, postal revenues and postal employment is far more tenuous than the loss of a specific job by a court reporter having an exclusive contract to perform it, as in the *Lujan* example. As noted in ACCA's Petition, a number of entirely conjectural assumptions and PRA ratemaking, policy, and management considerations may intervene in the causal chain. Pet. Cert. at 16 n.16. *See United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908, 914 (D.C. Cir. 1989) (increased competition has no predictable effect on employment).[16]

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[16] Note also that international mail amounts to less than 0.5 percent of Postal Service traffic. *See* 1985 Annual Report of the Postmaster General.

Third, if the prudential limitation of the zone of interest test is merely a negative option, those whose interests are no greater than the public at large will always be included in the zone, unless specifically excluded by Congress. Such a construction of the zone of interest test places the heavy burden on those drafting legislation to anticipate all who might some day seek to enforce the statute. Moreover, such broadening of standing tends to force the courts to replace the political arena for resolution of difficult public policy questions. *See Community Nutrition Institute v. Block*, 698 F.2d 1239, 1256-57 (D.C. Cir. 1983) (Scalia, J. *dissenting in part*), *reversed*, 467 U.S. 340 (1984).[17]

Finally, if the only purpose of the zone of interest test were to exclude those from standing whose suits would frustrate statutory objectives, as the court of appeals held, resolution of the standing issue in many cases would have to be deferred until a decision on the merits. Deferral of the standing inquiry defeats the purposes of standing tests to act as a sound prudential filter on cases the courts must hear. At least one commentator appears to advocate elimination of standing requirements altogether.[18]

2. The Court of Appeals Expanded the Zone of Interest Test to Cover Employees of the Affected Competitors

The court of appeals' view of the zone of interest test improperly expands the zone to include persons only derivatively affected by the agency action.

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[17] Indeed, the Unions' original defense of their standing argued that "[s]ince the Private Express Statues were designed to protect postal revenue for the benefit of the public of a viable nation-wide postal system, any member of the public could challenge the promulgation of a suspension of the monopoly by the Postal Service." Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment (April 24, 1988) at 6-7.

[18] *See, e.g.*, Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988).

The court of appeals' reliance on *Clarke, supra*, and *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), is misplaced. *Data Processing* was a "competor's" suit, as distinguished from *Flast v. Cohen*, 392 U.S. 83 (1942), a "taxpayer's" suit. *Data Processing* at 152. The Court in *Data Processing* held that the statute at issue regulated competition and that the plaintiff data processors, would-be competitors of banks permitted by the agency action to compete, were within the zone of interest of the statute, even though that was not the type of competition contemplated by the statute. *Id.* at 156. *Clarke* was also a competitor's suit and the Court analogized the facts to those of *Data Processing* on that basis. *Clarke*, 479 U.S. at 403.

Clarke and *Data Processing* do not apply here. This is not a taxpayer's suit or a competitor's suit, but an employee's suit under a competition law. The PES is a competition statute that regulates the conduct of competitors of the Postal Service. Indeed, unlike *Data Processing* and *Clarke*, the statutory scheme of the PES contemplates the type, if not the geographic scope, of the competition at issue in the International Remail Rule. The postal *employees* for whose benefit the Unions have brought suit here are not competitors of either the Postal Service or remailers. *Data Processing* and *Clarke* do not support extending the zone of interest under competition laws to *employees* of the competitors affected by agency action.

The court of appeals thus erred by extending the zone of interest to persons only indirectly affected by agency action under the PES. Employees are generally denied standing to enforce competition laws because they lack competitive and direct injury. *See, e.g., Adams v. Pan Am World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934, 961 (1988) (former airline employees denied standing to assert antitrust claim against airline that allegedly drove their former employer out of business); *Curtis v. Campbell-Taggart, Inc.*,

687 F.2d 336 (10th Cir. 1982), *cert. denied*, 459 U.S. 1090 (1983) (employees of corporation injured by anticompetitive conduct denied standing under antitrust laws); *see also National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989). It is difficult to conceive a policy reason why standing to enforce an *anti-competition* law such as the PES should be cast wider than standing to enforce *pro-competition* laws.

B. The Court of Appeals Misconstrued the Legislative History of the Restrictions on Private Carriage

1. Early Restrictions on Private Carriage of Letters Were A Function of Congressional Taxing Authority Which Do Not Implicate Postal Employees' Interests

The court of appeals relied upon the 1792 Act,[19] as "where Congress first embraced the concept of a postal monopoly." Pet. App. at 80.[20] The court found "that the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." *Id.* at 8a-9a. The court of appeals' reliance on

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19 Act of February 20, 1792, ch. 7, § 14, 1 Stat. 236.

20 Earlier in 1789, the first Congress reenacted without debate the postal ordinance passed by the Continental Congress in 1782 that actually authorized private carriage of letters on all non-government routes, in spite of the Congress' postal monopoly under the Articles of Confederation. Priest, *supra* n.1, at 48 n.71. "[T]the regulations of the post office shall be the same as they were under the resolutions and ordinances of the late Congress." 1 Stat. 70, 1st Cong., 1st Sess. (1789).

It is also noteworthy that the Post Office at the time was the result of the Continental Congress' take-over in 1775 of the privately-owned Constitutional Post started by a newspaper publisher whose father had been postmaster in the British colonial post office. R. Kielbowicz, *News in the Mail: The Press, Post Office and Public Information, 1700-1860's* 19-22 (1989).

the 1792 Act is misplaced because: (1) its "revenue protective" features were a function of congressional taxing authority under the Constitution; (2) it did not establish a "postal monopoly;" and (3) it did not benefit postal employees.

First, in 1792, what was then known as the General Post Office was part of the United States Treasury. Until Congress began the practice of simply declaring established roads and railroads to be "post roads" in the 1820's and 30's, the Treasury paid for post roads, preferably out of postal revenues.[21] The legislative history of the 1792 Act, though silent as to § 14 specifically, is replete with references to postal rates and revenues as "*taxes*"; suggestions that the establishment of post roads was a congressional function related to its exclusive taxing authority, and discussions of the franking privilege as an improper tax exemption.[22] Congress raised postage rates in 1815 to 1816 by 50 percent to defray the costs of the War of 1812[23] and the Post Office remained an adjunct of the Treasury until 1829.[24] Thus, to the extent that the 1792 restrictions protected revenues, they protected the general tax revenues of the Treasury and its investment in post roads. Postal employees could not have been benefited by, and lack standing to enforce, general tax protective provisions of the 1792 Act. *See ASARCO, Inc. v. Kadish*, ___ U.S. ___, 109 S.Ct. 2037, 2043 (1989) (suits premised on federal taxpayer status are not cognizable in the federal courts because their interests are too remote); *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 476-482 (1982).

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21 G. Cullinan, *The Post Office Department* 36 (1968).

22 *Debates and Proceedings in the Congress of the United States*, 2 Cong. Deb. 229-236, 275-277, 284-286, and 291-294 (December 1791) (1834).

23 Cullinan, *supra* n.21, at 28.

24 Cullinan, *supra* n.21, at 28-29.

Second, Section 1 of the 1792 Act established certain specific routes—as from Wiscasset, Maine to Savannah, Georgia—as "post roads." Section 14 limited private carriage of letters on those post roads.[25] Given the finite and limited designation of post roads in § 1 and the exceptions for special messengers and for gratuitous services under § 14, the 1792 Act cannot be said to embody the concept of a domestic postal monopoly. There was in fact no postal monopoly at the time.

Third, in 1792 the Post Office offered no pick-up or delivery services.[26] Statutory authority to employ letter carriers was not enacted until two years later in 1794 and was ignored until the late 1820's.[27] Clearly, the 1792 restrictions on private carriage protected the government's capital investment in the post roads, not the jobs of as yet virtually non-existent postal employees.

The 1825 Act, styled as "An Act to reduce into one the several Acts establishing and regulating the Post-office Department," repealed the 1792 Act and included a prohibition against

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[25] Section 14 provided:

> That if any person, other than the Postmaster General, or his deputies, or persons by them employed shall take up, receive, order, dispatch, convey, carry or deliver any letter or letters, packet or packets, other than newspapers, for hire or reward, or shall be concerned in setting up any foot or horse post, wagon or other carriage, by or in which any letter or packet shall be carried for hire on any established post-road, or any packet, or other vessel or boat, or any conveyance whatever, whereby the revenue of the general post office may be injured, every person so offending shall forfeit, for every such offence, the sum of two hundred dollars. *Provided*, That it shall and may be lawful for every person to send letters or packet by special messenger.

[26] *See* C. Scheele, *A Short History of the Mail Service* 66, 91 (1970).

[27] *See* Scheele, *supra* n.26, at 66; Cullinan, *supra* n.21, at 28.

the private use of "stage[s]" and "packet boat[s]."[28] In 1827 Congress cured a drafting oversight in the 1825 Act by amending the law to include foot and horse posts.[29] Postal employees cannot have been within the zone of interest of either the 1825 and 1827 Acts because they targeted transportation of mail which even then was contracted out to private carriers.[30] Therefore the 1825 and 1827 Acts did not benefit postal employees.

2. The Purposes of the 1845 Act Were to Control the Flow of "Intelligence" and to Integrate the Nation Politically and Economically

The court of appeals completely ignored the 1845 Act. Congress' deliberation of the 1845 Act was the only occasion

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[28] Sec. 19 of Chap. LXIV of the Act of March 3, 1825 provided:

> That no stage or other vehicle, which regularly performs trips on a post-road, or on a road parallel to it, shall convey letters; nor shall any packet boat or other vessel, which regularly plies on a water declared to be a post-road, except such as relate to some part of the cargo. For the violation of this provision, the owner of the carriage or other vehicle, or vessel, shall incur the penalty of fifty dollars. And the person who has charge of such carriage, or other vehicle or vessel, may be prosecuted under this section, and the property in his charge may be levied on and sold, in satisfaction of the penalty and costs of suit: *Provided, That it shall be lawful for any one to send letters by special messenger.*

IV Public Statutes at Large at 107 (1846) (emphasis added).

[29] Section 3 of Chap. LXI of the Act of March 2, 1827, 19th Cong., 2d Sess., provided:

> That no person, other than the Postmaster General, or his authorized agents, shall set up any foot or horse post, for the conveyance of letters and packets, upon any post-road, which is or may be established as such by law; and every person who shall offend herein, shall incur a penalty of not exceeding fifty dollars, for each letter or packet so carried.

[30] W. Fuller, *The American Mail: Enlarger of the Common Life* 150 (1972).

on which the postal monopoly was the subject of substantial debate.[31] The 1845 statute, entitled "An Act to reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds on the revenues of the Post Office Department,"[32] was the result of three circumstances, none of which involved the interests of postal employees. First, the Post Office Department continued to run substantial deficits in spite of high postage rates.[33] Second, high postal rates enabled private expresses to make substantial inroads into the domestic market for delivery of letters and the 1825 and 1827 Acts proved unsuccessful in prosecuting them.[34] Third, inauguration of the "penny post" in England quadrupled use of the mails and it was argued that substantial reduction of American postal rates would have the dual virtues of driving private expresses out of business and increasing mail volume for the Post Office. This in turn would help reduce the Post Office's deficit.[35]

Sections 9 through 13 of the Act limiting private carriage of letters had two-fold purposes. First, the Postmaster General and the states most distant from the commercial centers of the Northeast believed that the postal monopoly was necessary to prevent users of faster private expresses from taking advantage of early market "intelligence" and news of international affairs that had not yet reached the general populace through the slower

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[31] Priest, *supra* n.1, at 45.

[32] Statute II, Chapter XLII, Vol 2 U.S. Statutes at Large 1835-1845, at 732. The provisions relating to private express are in the Appendix hereto.

[33] *Report on Post Office Department Rates of Postage*, H.R. Rep. No. 477, 28th Cong., 1st Sess. 2-3, 5 (1844).

[34] Priest, *supra* n.1 at 60, citing *United States v. Gray*, 26 F. Cas. 18 (Mass. 1840), *United States v. Adams*, 24 F. Cas. 761 (S.D.N.Y. 1843).

[35] 14 Cong. Globe, 28th Cong., 2d Sess. 213 (1845) (remarks of Senators Simmons and Breese). *See also* H.R. Rep. No. 477, *supra* n.33, at 5.

mails.[36] Proponents also believed in the duty of the government to serve outlying, frontier areas even if it meant doing so below cost.[37] The "revenue protective" provisions were thus

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[36] *Report of the Postmaster General to the Senate*, S. Rep. No. 66, 28th Cong., 2d Sess. 3-4 (1845):

> The objects and purposes of a public mail are, to convey intelligence, by letter or packets, for all alike who may desire to send. The power which establishes and controls this mail should not permit it to be superceded by individual combinations, by the establishment of regular expresses between important points, for the conveyance of mail matter with or without charge . . .
>
> As the United States mail advances as rapidly as the ordinary channels of conveyance and the condition of the roads will allow, it will diffuse in its progress and on its arrival the same intelligence to all. Not so private express. Besides, these private expresses may be the means of conveying false intelligence, operating equal injury upon the commercial interest.

Id.; see also H.R. Rep. No. 477, *supra* n.33, at 1: "Through no other agency can the stated means of transmitting intelligence be maintained co-extensively with the population and settlement of the country."

See also Scheele, *supra* n.26, at 64-65.

[37] As stated in the House Report:

> To content the man dwelling remote from towns with his lonely lot, by giving him regular and frequent means of intercommunications; to assure the emigrant who plants his new home over the skirts of the distant wilderness, or prairie, that he is not forever severed from the kindred and society that still share his interest and love; to prevent those whom the swelling tide of population is constantly pressing to the outer verge of civilization from being surrendered to surrounding influences, and sinking into the hunter or savage state; to render the citizen, how far soever from the seat of his Government, worthy, by proper knowledge and intelligence, of his important privileges as a sovereign constituent of the Government; to diffuse, throughout all parts of the land, enlightenment, social improvement, and national affinities, elevating our people in the scale of civilization, and binding them together in patriotic affection; — these are con-

not an end in themselves, but the means to achieve national integration.[38]

The government's purported need to manage the flow of information is constitutionally suspect; was immediately mooted by the invention of the telegraph;[39] and, in any event, was never one that even "arguably" inured to the benefit of

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siderations which the advocates of the right of individual enterprise to the conveyance of the mails disregard.

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The business of conveying letters being a governmental function, it must, in the nature of things, be exclusive. Having to perform this duty on routes where the distances are long and the letters few, as well as where the distances are short and the letters many; and being required to do this at rates uniform according to distance, whether the letters are few or many, – it follows that, if individuals are permitted to engage in the business, by confining their operations to the routes on which they incur but small expense and transact large business, they can perform the service on such routes at a less charge than the Government, and will necessarily in time, deprive it all the business arising within the sphere of competition.

H.R. Rep. No. 477, *supra* n.33, at 2-3.

It is interesting to note that there was no nationally uniform postal rate at the time, nor was one being considered, hence the allusion to "rates uniform according to distance." The concern of the Committee was not that the Post Office would lose its profitable routes, but that it would be driven out of business entirely, i.e., lose "all the business arising within the sphere of competition."

[38] There was, of course, substantial debate on *how* best to rid the Post Office of competition from private expresses. Sen. Merrick, a proponent of the bill, urged lowering postal rates and increasing penal prohibitions, 14 Cong. Globe, *supra* n.35, at 206. Sen. Dana suggested lowering postal rates and increasing competition, *id.* at 348. This debate involved the means and not the ends of the legislation.

[39] *See* Fuller, *supra* n.30, at 172-173.

postal employees. The goal of protecting the rights of those on the frontier to obtain mail service as part of a "national compact,"[40] and subsidizing expansion of postal service to the frontier might "arguably" bring postal patrons from remote areas deprived of mail services within the PES's zone of interest, but lends no support whatever for the Unions' standing.

3. Exceptions to the Restrictions on Private Carriage Demonstrate Postal Employees' Lack of Interest in Revenue Protection

The suggestion that job opportunities and job security for postal employees are included in the goal of revenue protection for nation-building is dispelled by two provisions, one enacted in 1845, the other in 1852, that remain in the PES today. Section 11 of the 1845 Act provided that

> nothing in this act . . . shall be construed to prohibit the conveyance of letters . . . to any part of the United States, by private hands, no compensation being tendered or received therefor in any way, or by special messenger employed only for the single particular occasion.[41]

This exception, originally in § 14 of the 1792 Act, is now codified at 18 U.S.C. § 1696(c).[42]

In 1852 Congress created a further exception to the restrictions on private carriage of letters that demonstrates Congress' lack of intent to benefit for postal employees. Section 8 of the 1852 Act provided in part:

> All letters enclosed in [stamped] envelopes as shall be provided by the Postmaster General, ...

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[40] H.R. Rep. No. 477, *supra* n.33, at 1.

[41] Statute II, Chapter XLIII, § 11, Vol. 2 U.S. Statutes at Large 1835-1845, at 736.

[42] See p.3, *supra*.

> (and the such postage on such envelopes being equal in value and amount to the rates of postage to which such letters would be liable, if the same were sent by mail, ...) may be sent, conveyed, and delivered otherwise than by post or mail....[43]

This exception is now codified at 39 U.S.C. § 601(a)(2). *See* page 3, *supra*.

These two exceptions demonstrate that Congress did not intend to make work for postal employees. Under § 11 of the 1845 Act, if a "competitor" was willing to provide the service for free, Congress' nation-building objectives would be met and Congress was willing to forego both the revenues and the work

[43] 10 Statutes at Large, 32d Cong., 1st Sess., 140-141 (1852). The following amendments are recodifications which occured after 1852:

The Act of March 25, 1864, ch. 40, § 7, 13 Stat. 37, enacted the suspension provision now in § 601(b).

Statutes at Large, Title XLVI CA. 335, 42d Cong., 2d Sess. (1872).

In 1874, all the statutes of the United States were revised and codified into the Revised Statutes. Section 228 of the 1872 Act (now § 1696(a)) became § 3982 of the Revised Statutes. Similarly, § 230 became R.S. § 3984; and § 238 became R.S. § 3992. *See* Revised Statutes §§ 3982, 3984, 3992, 20 Stat. 775-76 (1874).

The Act of March 3, 1879, ch. 180, § 1, 20 Stat. 356, amended what is now § 1696(a) to make clear that private delivery to the nearest Post Office was not forbidden.

On March 4, 1909, Congress codified the criminal laws. Prohibitions against private expresses were moved from the postal code to the criminal code. *See* Criminal Code of 1909, ch. 321, §§ 181, 183, 186, 35 Stat. 1124-25. *See also* Special Joint Comm. on the Revision of the Laws "Revision and Codification of Law Etc.," S. Rep. No. 10, 60th Cong., 1st Sess., pt. 1 (1909).

The Act of June 22, 1934, ch. 716, 48 Stat. 1207, amended what is now § 1696(c) to limit the "special messenger" exemption to carriage of 25 or fewer letters. The amendment was aimed against public utilities delivering their own bills. Even in the depth of the Great Depression there was no mention

for postal employees. Under § 8 of the 1852 Act, if a customer was willing to pay postage *and* a private courier, Congress was happy to accept the revenue without providing the service and again forego the employment opportunity for the postal employee.

In sum, the history of the PES demonstrates that the court of appeals below erred by focussing exclusively on the 1792 Act; on the revenue protective *means* rather than Congress' nation-building and "intelligence" control *ends* originally served by the PES, and on an unwarranted job protection "gloss" on revenue protection. As stated by the court of appeals for the Sixth Circuit:

> It cannot seriously be contended that the Private Express Statute was enacted for the protection of a class which included the postal employees or a union representing them.

American Postal Workers Union, AFL-CIO, Detroit Local v. Independent Postal System of America, Inc., 481 F.2d 90, 93 (6th Cir. 1973), *cert. dismissed*, 415 U.S. 901 (1974).[44]

of any interest of postal employees. *See* 78 Cong. Rec. 7376, 8230, 8783-34 (1934); H.R. Rep. No. 1328, 73d Cong., 2d Sess. 1-2 (1934); H.R. Rep. No. 1613, 74th Cong., 1st Sess. 1-2 (1935).

The Act of June 29, 1938, ch. 805, 52 Stat. 1231, amended what is now § 601(a) to permit private carriage of metered mail. *See* 83 Cong. Rec. 9665.

Section 1696 of 18 U.S.C., ch. 645, 62 Stat. 777, enacted the criminal code of 1948 into title 18 of the U.S. Code. Sections 181, 183 and 186 of the 1909 code were gathered into a single section.

[44] *But see National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc.*, 470 F.2d 265 (6th Cir. 1972); *American Postal Workers Union v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985).

C. The 1970 Postal Reorganization Act Does Not Bring the Unions Within the Zone of Interest of the Private Express Statutes

The court of appeals erred in looking beyond the PES to the PRA to determinate the zone of interest of the PES, because it is the PES "whose violation forms the legal basis for [the Unions'] complaint." *Lujan*, *supra*, 58 U.S.L.W. at 5080. If the PRA has any relevance to the zone of interest of the PES, it tends to confirm that postal employees were never the intended beneficiaries of restrictions on private carriage. The PRA reflects a congressional intent to *reduce* the influence of postal employees in the conduct of the Postal Service's *business*.

1. The Private Express Statutes and the Postal Reorganization Act Lack a Single Unified Purpose

The court of appeals erred in considering the PRA "relevant" to the zone of interest of the PES, because the two statutes do not have a "single unified purpose" as required by *Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150, 155 (1970). The purposes of the PES and the PRA are multiple, divergent and, indeed, contradictory.

The objective of the PES was to foster national economic and political integration and to control the flow of intelligence, while the objectives of the PRA were to reduce labor costs, increase automation, and create a more efficient, businesslike postal service organization.[45] Rather than sharing a single unified purpose, the PES and the PRA are at cross-purposes: the PES's goal of monopoly, particularly government monopoly, is

[45] *See Report of House Committee on Post Office and Civil Service on the Postal Reorganization and Salary Adjustment Act of 1970*, H.R. Rep. No. 1104, 91st Cong., 2d Sess. 1-2 (1970); *Peoples Gas, Light & Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1196 (7th Cir. 1981) ("Only the consumer interest is arguably within the zone of interest protected by the [Postal Reorganization] Act").

recognized as inefficient;[46] whereas the PRA's goal was to promote efficiency by making the Postal Service more like a private, competitive enterprise and allow the market to determine postal services.[47]

In sum, the PRA had the modern purpose of efficiency, while the PES sought to build the nation by the now outmoded means of a government monopoly.

There are other provisions of the PRA that manifest a sharp diversity with the goals of the PES. Section 7 of the PRA called on the Board of Governors of Postal Service to reconsider the PES in light of technological developments.[48] Thus, § 7 demonstrates Congress' recognition of the divergence of the PES and PRA's purposes.[49] In addition, the PRA ended the

[46] Department of Justice Comments, Jt. App. at 22. Adie, *Why Marginal Reform of U.S. Postal Service Won't Succeed, Free the Mail* 85 (1990).

[47] Fuller, *supra* n.30, at 332-333.

[48] Section 7 provides:

> The Congress finds that advances in communications technology, data processing, and the needs of mail users require a complete study and thorough reevaluation of the restrictions on private carriage of letters and packets contained in chapter 6 of title 39, 1694-1696 of title 18, United States Code, and the regulations established and administered under these laws. The Board of Governors of the United States Postal Service shall submit to the President and the Congress within 2 years after the effective date of this section a report and recommendation for the modernization of these provisions of law, and such regulations and administrative practices.

Pub. Law 91-375, 84 Stat. 783 (August 12, 1970).

[49] On June 29 1973, the Board of Governors issued a "deliberately brief" 14 page report entitled "The Private Express Statutes and Their Administration," that recommended leaving the PES alone. *See* Lib.Cong. KF 2665 .A39, cited by the court of appeals as Board of Governors, *Statutes Restricting Private Carriage of Mail and Their Administration*, 93d Cong., 1st Sess. 5 (Comm. Print 1973). The court of appeals mistakenly imputed the Board's satisfaction with the PES to Congress and erroneously concluded that the

policy of rate cross-subsidies among classes of service, long a cornerstone of the PES. As a general matter, Congress declared that "[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U.S.C. § 101(d) (1970). More specifically, Congress created the Postal Rate Commission to oversee ratemaking, 39 U.S.C. Ch. 36, and required that ". . . each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type. . ." 39 U.S.C. § 3622 (1970).

The court of appeals held that an "interplay" between the PES and PRA, short of an identity of purpose, establishes an "arguable or plausible relationship between the purposes of the PES and interests of the Union." Pet. App. at 8a-9a (internal punctuation omitted). The court did not define what it considered an "interplay." The principles of standing in general and the zone of interest test in particular are confusing enough, and have been severely criticized for that reason by courts[50] and commentators[51] alike, that they do not need the further ambiguity that the court of appeals' vague new "interplay" standard creates.

PES "play a pivotal role in achieving an important purpose of the PRA..." Pet.App. at 8a. Note also that the report is absolutely silent as to postal employees, let alone any interest they might have in the PES.

[50] *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 736 F. Supp. 267, 273 (N.D. Ga. 1990) ("Supreme Court precedent in this area is confusing").

[51] *See e.g.*, Fletcher, *supra* n.18, at 221 ("the structure of standing law in the federal courts has long been criticized as incoherent").

2. The PRA's Elimination of Civil Service Protection and Enactment of Other Postal Reforms Opposed by the Unions Precludes Its Use to Evidence Congress' Intent to Establish Employment Security as a Purpose of the PES

The Unions *opposed* postal reorganization, because (1) it would eliminate the job security their members enjoyed under Civil Service, *see* Rademacher testimony, *supra* n.7, at 745; (2) automation, labor cost reduction and contracting out provisions would reduce employment opportunities, *id.* at 739-740; (3) it would eliminate cross-subsidies in rate-making, *id.* at 743; (4) it contained a right to work provision, *see id.* at 756;[52] and (5) it included the labor-management reforms (upon which the court of appeals relied heavily to find an "interplay" between the PRA and the PES). Mostly the Unions objected to the PRA because it would cut off postal employees from their congressional benefactors. *Id.* at 746. Generally, the statements of union *opposition* to postal reorganization were strikingly similar to those historically used to justify the restrictions on private carriage.[53] Congressional passage of the PRA over these objections, if anything, demonstrates PRA was a step back from the PES. The PRA is a particularly inapt vehicle for backing postal employees into the PES's zone of interest in which Congress had not seen fit to include them during the preceding 200 years.

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[52] *See also Hearing of the House Committee on Post Office and Civil Service*, 91st Cong., 1st Sess. 1054 (testimony of George Meany, President, AFL-CIO).

[53] *See* Meany Testimony, *supra* n.52, at 1049-1050.

II.

THE COURT OF APPEALS ERRED IN FINDING THE UNIONS IN THE ZONE OF INTEREST OF THE PES WHETHER APA § 702 OR PRA § 409 IS THE PROPER JURISDICTIONAL BASIS FOR THE UNIONS' COMPLAINT

The Unions' complaint invoked § 409 of the PRA as the jurisdictional basis for challenging under the PES the Postal Service promulgation of the Remail Rule. Jt. App. at 108. The district court below applied the zone of interest test under the mistaken assumption that the Unions had brought suit under § 702 of the Administrative Procedures Act, 5 U.S.C. § 702. Pet. App. at 34a. The court, however, noted that the zone of interest test applied whether a suit challenged agency action or not. *Id.* at 33a n. 3, citing ***Tax Analysts and Advocates v. Blumenthal***, 566 F.2d 130, 144-45 (D.C. Cir. 1977), ***Data Processing***, ***supra***, and ***Clarke***, ***supra***.

The court of appeals, on the other hand, recognized that "[t]he district courts have original jurisdiction over suits against the Postal Service," citing 39 U.S.C. § 409 (1982). Pet. App. at 4.a. The court went on to cite the Postal Service's exemption from the APA pursuant to 39 U.S.C. § 410(a), but concluded that "the APA provides the appropriate standards for evaluating the procedural and substantive issues in this case," because the Postal Service "has chosen to follow the APA when promulgating rules affecting the PES," citing 39 CFR § 310.7(1988). *Id.* Later in its opinion, however, the court of appeals stated that "[t]he Union's cause of action derives from § 702 of the APA. . ." *Id.* at 6a.

As the district court correctly noted, the zone of interest test has been applied in both APA and non-APA cases. This Court has stated that its invocation of the zone of interest in non-APA cases "should not be taken to mean that the standing

inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the A.P.A. apply." *Clarke*, 479 U.S. at 400 n.16. The *Clark* footnote suggests that standing requirements in non-APA cases may require the plaintiff to satisfy the zone of interest test plus something more, unless the "generous review provisions of the APA apply." The court of appeals did of course apply the APA's generous review provisions based on the Postal Service's stated intent to abide by the APA's "rulemaking provisions."

The court of appeals erred in its determination that the Unions were within the zone of interest of the PES, whether or not the court of appeals was correct in applying the generous review provisions of § 702. There is nothing in § 409 to suggest that it is even more "generous" than § 702. Therefore, inasmuch as the Unions have failed to satisfy the zone of interest test, they *a fortiori* cannot meet any alternative standing test under § 409 that would require them to satisfy the zone of interest test and something more, regardless of what that additional burden might be.

III.

THE POSTAL SERVICE'S PROMULGATION OF THE INTERNATIONAL REMAIL RULE WAS NOT UNREASONABLE, ARBITRARY OR CAPRICIOUS

While the court of appeals correctly recognized that it "may not impose its own rigid interpretation of the 'public interest,'" Pet. App. 15a, it did just that in the guise of statutory construction where none was called for. The court erred by rewriting the public interest standard of § 601(b) to include a requirement that the Postal Service "give sufficient attention to how revenue losses might affect cost and service of other postal patrons." Pet. App. 14a.

A. Absent a Legal Issue as to the Meaning of the Public Interest Requirement the Court of Appeals Should Have Deferred to the Postal Service's Interpretation

Neither the Postal Service's interpretation of the PES as extending to international mail nor its authority to suspend the PES were at issue before the court of appeals or are at issue here.[54] What the Unions originally challenged and what is at issue before this Court is the manner in which the Postal Service exercised that suspension authority under § 601(b)'s public interest standard. The court of appeals did not disturb the district court's rejection, Pet. App. 35a, of the Unions' request that the statute's "where the public interest requires" language be construed as imposing a "heightened standard." *See* Pet. App. 12a. There was therefore no need for the court of appeals to delve into the legislative history of the PES to resolve "specific issues

[54] Nevertheless, ACCA questions the Postal Service's interpretation of the PES as extending to international mail and its administrative definition of "letters." ACCA also questions whether the Postal Service, as an interested competitor can properly administer the regulatory scheme created by the PES. *Cf. Gibson v. Berryhill*, 411 U.S. 564 (1973); *Word v. Village of Monroeville*, 409 U.S. 57 (1972).

of law raised in the proceeding under review." Pet. App. 13a (quoting *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1496-97 (D.C. Cir. 1988). Absent a legal issue as to the meaning of the public interest standard, the Postal Service's interpretation is entitled to deference and the analysis set forth in *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984), is inapplicable. Inasmuch as there is no dispute, "the intent of Congress is clear [and] that is the end of the matter." *Chevron*, 467 U.S. at 842-843.

Second, the court of appeals misconstrued the requirements of *Chevron*. If there were any legal issues concerning the public interest standard that would require further inquiry, *Chevron* dictates that where there is no "unambiguously expressed intent of Congress," *id.* at 843, the court of appeals should not substitute its own construction for the public interest standard for that of the Postal Service. *Id.* at 844; *see also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 1220-22, 1224-25 (1987). The court of appeals identified no unambiguous intent of Congress to require the consideration of the effect of a suspension of the PES on the cost and service to all postal patrons.[55] Accordingly, the Postal Service's interpretation of the public interest standard as being satisfied by the existence of general benefits to the public, competition, international competitiveness, and users of remail must be given deference.

Third, having unnecessarily tapped the legislative history of the PES, the court of appeals then used its erroneous reading of that legislative history to substitute its own judgment of what the public interest analysis should have entailed. After separa-

[55] Congress itself never engaged in the wide ranging inquiry in enacting any exception to the PES that the court of appeals would not require of the Postal Service. Congress, as best as can be determined, arrived at a general conclusion that the exceptions were in the public interest. That of course is exactly what the Postal Service did in issuing the international remail rule.

tion of the Post Office from the Treasury in the early 1820's, revenues *per se* were never a goal of the PES. If they were, the Postal Service could have justified virtually any intrusion into the unregulated private sector in the name of increased revenues. Later, revenues were a means to an end that has been by and large accomplished.

Still, the Postal Service did consider its own worst case scenario as to loss of revenues and determined that the total potential loss of revenue (not net revenue) of $ 882 million in 1985 would not be "so adverse as to outweigh allowing remailing to continue." 51 Fed. Reg. at 21, 931 (June 17, 1986). The Postal Service's judgment was never challenged by those arguably intended to benefit by those revenues, the "frontier" mail user. Of course, given the Justice Department's doubts as to the application of the PES to international mail it is questionable whether any adverse impact of the loss of international mail revenues would even be relevant to the purposes of the PES.

B. The Administrative Record Supports the International Remail Rule As Consistent With the Purposes of the PES Even Under the Court of Appeals' Reading of the Public Interest Standard

The administrative record contains the International Remail Committee's detailed analysis of the effects of the remail rule on the various classes of Postal Service. The International Remail Committee's comments in opposition to the first proposed anti-Remail Rule offered a detailed analysis of the effects on net Postal Service revenues, on remail of international printed matter, on remail of first matter, on Express Mail and on inbound remail. Admin. Rec. 32, at 38-43. That analysis, which concluded that the rule would have no adverse effect, was not rebutted. The Remail Committee compared the effects of remail to the board of Governors' own analysis of the purposes of the PES and found them to be consistent.

In addition, the Remail Committee on December 23, 1985 submitted additional comments explaining certain "myths" about remail and summarizing the public comments of others. The general counsel of the Postal Service on January 7, 1986 wrote to counsel for the Committee indicating that the Postal Service

> very much appreciate[s] the careful exposition of [The Committee's] views on this subject and the summary of comments which members of the public have submitted. We will certainly be taking your views and those of your clients into account as we consider the action to be taken on our proposal.

Admin. Rec. 71.

The Postal Service in its statement issuing the rule stated that it considered all submissions. Accordingly, the Postal Service actually made the very analysis the court of appeals held it should have made and reached a rational decision that remail did not violate the purposes of the PES. In short, the Postal Service considered the factors suggested by the court of appeals and determined that remail furthered, rather than defeated the purposes of Congress.

C. Achievement of the PES's Purposes Requires Greater Deference to the Congress' Subsequent Enactments

The piecemeal enactment of the PES between the late 1700's and mid-1800's to control the flow of information and to build the nation by helping to finance expansion of postal service to the frontier leaves anachronistic relics on the statute books today. Both goals have been accomplished or mooted by subsequent technology and national economic and political integration.[56] To the extent that the revenue protective

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[56] *See* Fuller, *supra* n.30, at 332-333 (nation-building goals of the PES were accomplished by World War I).

measures of the PES designed to complement the original nation-building goal retain any independent viability now that that goal has been achieved, such measures must be constrained by later congressional pronouncements. *See generally, Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).[57]

Two statutes are relevant. The Sherman Act, 15 U.S.C. §§ 1 *et seq.*, whose centennial was celebrated just this month[58] and which constitutes the "Magna Carta of free enterprise,"[59] and the PRA. The law now favors competition over monopoly. Indeed, Congress in the 1970 PRA called on the Postal Service to reconsider and make recommendations on amending the laws limiting the private carriage of letters.[60] The Justice Department, of course, enforces both the antitrust laws and the criminal provisions of the PES. As such, it is both a partner of the Postal Service in the administration of the PES — whose interpretation of the PES is entitled to particular deference — and particularly well qualified to resolve the conflicts between the outmoded PES and the pro-competitive policies of the later-enacted Sherman Act. The Justice Department resolved the conflict in favor of the remail rule. It also reviewed the record and found it to support the rule.

Accordingly, the burden of persuasion was on those opposing the Remail Rule to establish that some underlying purpose

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[57] We do not suggest that the antitrust laws repealed the PES. But given the accomplishment of the PES's goals, its prohibitions should be construed narrowly and interpreted to the greatest extent possible consistently with the antitrust laws.

[58] 58 ATRR 999 (June 28, 1990).

[59] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (Marshall, J.).

[60] The Board of Governors' token report electing to leave the laws alone bespeaks the institutional inertia that clings to old ways well after their *raison d'etre* has ceased to exist. In any event the report represents the Board's and not Congress' views. *See* note 49, *supra*.

of the PES would be defeated by the rule. Indeed, rather than having the Postal Service justify a more limited remail rule, it was up to the opponents to show why the remail rule went too far. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (anticompetitive restrictions limited to extent necessary to make regulatory scheme work).

Neither the Unions nor any other commentators opposing the rule submitted any factual argument suggesting that the suspension would defeat any congressional purpose of the PES. Predictably, not a single representative of any remote area opposed the rule. The Unions also failed to argue that such service would be affected. Moreover, the Remail Rule has been in effect for nearly four years. During that time no postal patron has sought any Postal Rate Commission investigation pursuant to 39 U.S.C § 3662 on grounds that it has been deprived of service or that rates it is charged are too high as a result of the Remail Rule.

In sum, the Postal Service was not unreasonable, arbitrary or capricious in promulgating the Remail Rule and the court of appeals erred in so holding.

CONCLUSION

For the reasons set forth petitioner ACCA respectfully requests the Court to reverse the court of appeals' order, reinstate the judgment of the district court and award costs against respondent Unions.

Respectfully submitted,

Of Counsel:

JAMES I. CAMPBELL, JR.
2011 Eye Street, N.W.
Washington, D.C. 20006
(202) 223-7080

L. PETER FARKAS
Counsel of Record
BRETT S. SYLVESTER
SUGHRUE, MION, ZINN,
MACPEAK & SEAS
2100 Pennsylvania Ave., N.W.
Washington, D.C. 20037-3202
(202) 293-7060

Attorneys for Petitioner

Dated: July 27, 1990

APPENIDIX

Sec. 9. *And be it further enacted*, That it shall not be lawful for any person or persons to establish any private express or expresses for conveyance, nor in any manner to cause to be conveyed, or provide for the conveyance, or transportation by regular trips, or at stated periods or intervals, from one city, or other place, to any other city, town, or place in the UNited States, between and from and to which cities, towns, or other places the United States mail is regularly transported, under the authority of the Post Office Department of any letters, packets, or packages of letters, or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals; and each and every person offending against this provision, or aiding and assisting therein, or aiding such private express, shall, for each time any letters, packet or packages or other matter properly transmittable by mail, except newspapers, pamphlets, magazines, periodicals , shall or may be, by him or them, or through his her or their means or instrumentality, in whole or in part, conveyed or transported, contrary to the true intent, spirit, and meaning of this section, forfeit and pay the sum of one hundred and fifty dollars.

SEC. 10. *And be it further enacted*, That it shall not be lawful for any stage–coach, railroad car, steamboat, packet boat, or other vehicle or vessel, nor any of the owners, managers, servants, or crews of either, which regularly performs trips at stated periods on a post route, or between two or more cities, towns, or other places, from one to the other of which the United States mail is regularly conveyed under the authority of the Post Office Department, to transport or convey, otherwise than in the mail, any letter or letters, packet or packages of letter or other mailable matter whatsoever, except such as may have relation to some part of the cargo of such steamboat, packet boat, or other vessel, or to some article at the same time conveyed by the same stage coach, railroad car, or other vehicle, and excepting also,

newspaper, pamphlets, magazines, and periodicals; and for every such offence, the owner or owners of the stage–coach, railroad car, steamboat, packet boat, or other vessel, shall forfeit and pay the sum of one hundred dollars;and the driver, captain, conductor, or person having charge of any such stage–coach, railroad car, steamboat, packet boat, or other vehicle or vessel, at the time of the commission of any such offence, and who shall not at that time be the owner thereof, in whole nor in part, shall in like manner, forfeit and pay, in every such case of offence, the sum of fifty dollars.

SEC. 11. *And be it further enacted*, that the owner or owners of every stage–coach, railroad car, steamboat, or other vehicle or vessel, which shall, with the knowledge of any owner or owners, in whole or in part, or with the knowledge or connivance of the driver, conductor, captain, or other person having charge of any such stage-coach, railroad car, steamboat, or other vessel or vehicle, convey or transport any person or persons acting or employed as a private express for the conveyance of letters, packets, or packages of letters, or other mailable matter, and actually in possession of such mailable matter, for the purpose of transportation , contrary to the spirit, true intent, and meaning of the preceding sections of this law, shall be subject to the like fines and penalties as are hereinbefore provided and directed in the case of persons acting as such private expresses, and of persons employing the same; but nothing in this act contained shall be construed to prohibit the conveyance or transmission of letters, packets, or packages, or other matter, to any part of the United States, by private hands, no compensation being tendered or received therefor in any way, or by a special messenger employed only for the single particular occasion.

SEC. 12. *And be it further enacted*, That all persons whatsoever who shall, after the passage of this act, transmit by any private express, or other means by this act declared to be unlawful, any letter or letters, package or packages, or other mailable matter, excepting newspapers, pamphlets, magazines and periodicals, or who shall place or cause to be deposited at any appointed place, for the purpose of being transported by such unlawful means, any matter or thing properly transmittable, by mail, excepting newspapers, pamphlets, magazines and periodicals, or who shall deliver any such matter, excepting newspapers, pamphlets, magazines and periodicals for transmission to any agent or agents of such unlawful expresses, shall, for each and every offence, forfeit and pay the sum of fifty dollars.

SEC. 13. *And be it further enacted*, That nothing in this act contained shall have the effect, or be construed to prohibit the conveyance or transportation of letter, by steamboats, as authorized by the sixth section of the act entitled 'An act to reduce into one the several acts for establishing and regulating the Post Office Department, approved the third of March, one thousand eight hundred and twenty-five:" *Provided*, That the requirements of said sixth section of said act be strictly complied with, by the delivery, within the time specified by said act, of all letters so conveyed, not relating to the cargo, or some part thereof, to the postmaster or other authorized agent of the Post Office Department at the port or place to which said letters may be directed, or intended to be delivered over from said boat; and the postmaster or other agent of the Post Office Department shall charge and collect upon all letters or other mailable matter, so delivered to him, except newspapers, pamphlets, magazines, and periodicals, the same rates of postage as would have been charged upon said letters had they been transmitted by mail from the port or place at which they were placed on board the steamboat from which they were received; but it is hereby expressly provided, that all the pains and penalties provided by this act, for any violation of the provisions of the eleventh

section of this act, shall attach in every case to any steamboat, or to the owners and persons having charge thereof, the captain or other person having charge of which shall not, as aforesaid, comply with the requirements of the sixth section of the said law of one thousand eight hundred and twenty-five. And no postmaster shall receive, to be conveyed by the mail, any packet which shall weigh more than three pounds.